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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action for recovery of withdrawal liability under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1451, arises: (a) on the date an employer withdraws from the plan; (b) on the date the first payment becomes overdue; (c) for each payment due, on the date that payment becomes overdue, unless the plan sponsor elects to invoke the statutory provision permitting acceleration of the entire withdrawal liability debt after default; or (d) on some other date.

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PETITION FOR WRIT OF CERTIORARI

The Board of Trustees of the Bay Area Laundry and Dry Cleaning Pension Trust Fund ("Trustees"), the plaintiff in the district court and the appellant in the Court of Appeals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 73 F.3d 971 and is reprinted as Appendix A to this Petition (App.), at App. 1a-5a. The opinion of the United States District Court for the Northern District of California is unreported and appears as Appendix B, at App. 6a-19a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing on May 13, 1996. App. 20a. On August 1, 1996, Justice O'Connor extended the time within which to file the petition for writ of certiorari to and including September 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations involved are set forth in Appendix E to the Petition, App. 30a-49a.

STATEMENT OF THE CASE

1. The Statutory Scheme

The Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.*,[1] as amended by the Multiemployer Pension Plan Amendments Act of 1980, requires an employer withdrawing from a multiemployer pension plan to pay its share of any unfunded vested pension obligations. § 1399(b)(1). An employer ordinarily completely withdraws from a multiemployer plan when it permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. § 1383(a).[2] The amortized withdrawal liability payments are calculated by the fund and assessed to the withdrawing employer according to a schedule set up by the fund but in large part dictated by the statute, with payments to begin within sixty days after the fund demands payment. § 1399(c)(2).[3]

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[1] All subsequent statutory citations are to Title 29 of the United States Code unless otherwise indicated.

[2] There are special complete withdrawal provisions covering certain industries and circumstances. *See* n.6 and p. 12, *infra*.

[3] The multiple and complex calculations that must be performed by the plan's actuary in order to assess withdrawal liability are described in *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 609-10 (1993).

Within 90 days after receiving the plan sponsor's notice of withdrawal liability, the employer may ask the plan sponsor to review the determination of liability or the schedule of payments, or both. § 1399(b)(2)(A)(i). After this review, any dispute concerning the demand is subject to arbitration (§ 1401(a)(1)): Within 60 days after (a) the plan sponsor's response to the employer's request for review or (b) 120 days after the employer's request for review, whichever is earlier, the employer may initiate arbitration. § 1401(a)(1). While the arbitration proceeds, the employer must make periodic interim payments according to the schedule set forth by the plan sponsor. §§ 1399(c)(2), 1401(d).

If the employer does not meet its withdrawal liability obligations, the statute provides a cause of action by the plan trustees:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both. [§ 1451(a)(1)]

As to the limitations question, the critical statutory section provides:

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action. [§ 1451(f)]

The issue in this case is when the statute of limitations established by § 1451(f) begins to run on a cause of action for failure to make withdrawal liability payments.

2. Facts

Ferbar Corporation ("Ferbar" or "the employer") contributed to the Bay Area Laundry and Dry Cleaning Pension Fund ("Trustees" or "Fund") for several years for three business locations, but ceased all contributions on or about March 1, 1985. CR. 13 at 1-2.[4]

On December 12, 1986, the Fund assessed withdrawal liability against Superior French Laundry, one of the three laundries operated by Ferbar, in the amount of $45,580.80. CR. 13 at 2. The assessment notice gave Ferbar a choice between a single lump-sum payment of the total withdrawal liability by February 10, 1987, and monthly installment payments of $345.50 commencing February 1, 1987. The notice also stated that the employer would be deemed in "default" if any delinquency were not cured within 60 days after notice of delinquency, and that Ferbar was required by law to make the payments as scheduled notwithstanding any request for review or appeal. CR 15, Exh. 1.

By letter dated February 27, 1987, Ferbar exercised its right to request review of the assessment by the Trustees. CR. 16, Exh. 2. During the pendency of the review, Ferbar made no payments on its withdrawal liability. CR. 13 at 3.

Having received no withdrawal liability payments, the Fund, on April 14, 1987, notified Ferbar of the delinquency. CR. 16, Exh. 3. The delinquency notice stated that Ferbar had sixty days to cure the delinquency, or it would be in "default," in which case liability for the full amount of outstanding withdrawal liability could be accel-

[4] These facts were accepted as true for purposes of summary judgment.

erated. And the notice of delinquency notified Ferbar once again that ERISA required it to make the scheduled payments notwithstanding any request Ferbar might make for review or appeal of the Fund's determination.

Ferbar did not cure its delinquency after receiving the delinquency notice, but did, on July 8, 1987, request arbitration of its disputed withdrawal liability. CR 16, Exh. 4. Ferbar made no payments of withdrawal liability at any time.

3. Proceedings

The Trustees filed their complaint for collection of unpaid withdrawal liability on February 9, 1993, eight days more than six years after the first withdrawal liability payment was due under the assessment but less than six years after any other payment of the withdrawal liability was due, and less than six years after the entire amount of the withdrawal liability could have been demanded under the assessment *or* the statute. CR. 1. Ferbar answered on March 23, 1993. CR. 3. Thereafter, Ferbar filed a Motion for Summary Judgment based solely on failure to meet the applicable statute of limitations, and the Trustees filed a cross-motion for summary judgment. CR. 10, 14.

The District Court held that the Trustees' action was time-barred under the three-year "discovery" statute of limitations set forth in § 1451(f)(2), notwithstanding the express language in the statute providing that the applicable limitations period is "the later of" the three-year discovery period in § 1451(f)(2) or the six-year accrual period in § 1451(f)(1). Alternatively, the District Court held that the Trustees' action was also time-barred under the six-year limitations period in § 1451(f)(1), concluding that the Trustees' cause of action arose, and the limitations period on the entire amount of the withdrawal liability began to run, on February 1, 1987, when Ferbar failed to make the first installment payment on the date scheduled by the Fund.

On appeal, the Ninth Circuit held that the District Court had erred by applying the three-year discovery limitations period in § 1451(f)(2). The Ninth Circuit affirmed the judgment, however, holding that the action was time-barred under the six-year limitations period of § 1451 (f)(1).

Unlike the District Court, which had viewed the cause of action as arising on the date of the first missed payment, the Ninth Circuit ruled that a cause of action under § 1383(a) accrues, and the limitations period of § 1451 (f)(1) begins to run, on the date on which an employer completely withdraws from a plan. In so holding, the court relied upon its own decision in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), a case construing the relationship between a different withdrawal liability subsection of the statute, § 1383(b), and the statute of limitations provision, § 1451(f).[5] Because Ferbar had effected a complete withdrawal from the Fund more than six years before the Trustees' action was filed, the Ninth Circuit affirmed the summary judgment for Ferbar. App. 5a.

Judge Trott concurred reluctantly, stating that he was compelled to join in the judgment by the court's previous decision in *Thibodo*. In his concurrence, Judge Trott, noting that the D.C. Circuit had, in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.); *cert. denied*, 493 U.S. 918 (1989) decided the same statute of limitations issue differently than the Ninth Circuit did in this case, expressed the view that *Joyce* "does a better job of answering the questions raised by these issues . . . ." App. 5a.

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[5] The *Thibodo* opinion appears in Appendix D to this Petition, at App. 21a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to resolve a serious and multifaceted disagreement among the circuits on the application of the statute of limitations governing actions by multiemployer pension benefit plans to recover ERISA withdrawal liability payments.

The Ninth Circuit held that the § 1451(f)(1) limitations period begins to run on the date that the employer completely withdraws from a multiemployer pension fund. It so held even though, as this Court recognized last year in *Milwaukee Brewery Workers v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S.Ct. 981 (1995), the statute does *not* impose any obligation on the employer to make any payment on the date of withdrawal. Instead, the statute simply uses that date in assessing the amount and number of payments due to be paid by the employer considerably later, after the plan calculates the total amount due, sets out the required payment schedule, and makes a demand for payment. 115 S.Ct. at 988. Thus, according to the Ninth Circuit, the statute of limitations on a suit to collect withdrawal liability begins to run well before the plan trustees can file such a suit.

The four other circuits that have ruled on the limitations period applicable to collection of withdrawal liability all disagree with the Ninth Circuit on this point. Those circuits hold instead that the statute of limitations begins to run from the date when the plan trustees first can bring suit on the claims, not months or years before that. Since, under the complex statutory system for assessing and collecting withdrawal liability reviewed in *Schlitz*, the right to file a collection action arises only after withdrawal liability has been assessed and payment is due, all four of the other circuits hold that the statute of limitations under § 1451(f)(1) begins to run only then. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123-24, *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 172 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Board of Trustees of the Dist. No. 15,*

Machinists Pension Fund v. Kahle Eng'g. Corp., 43 F.3d 852, 859-61 (3d Cir. 1994); *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1, 3-4 (1st Cir. 1996).

At the same time, those circuits are in discord among themselves as to precisely how the limitations period applies once there has been the requisite statutory demand for payment: The Seventh and Third Circuits are directly at odds concerning whether, as the district court in this case held, the limitations period for the entire amount of withdrawal liability runs from the first missed payment or whether, instead, there is a separate limitations period running from each missed payment unless and until the multiemployer plan exercises its statutory option to accelerate the withdrawal payment obligation because of default. *Compare Navco, supra* (single limitations period for entire amount), with *Kahle Engineering Corp., supra* (separate period for each missed payment unless the payment obligation is accelerated after default).

The various interpretations of the statutory limitations period adopted by the circuits yield widely varying results on the same facts. In this case, for example, the action for collection of withdrawal liability is timely under the District of Columbia Circuit's interpretation of § 1451 (f)(1) adopted in *Joyce v. Clyde Sandoz Masonry* and the Third Circuit's interpretation adopted in *Kahle Engineering Corp.*, but is untimely under the Ninth Circuit's rule in this case and under the very different statutory interpretation reached by the Seventh Circuit in *Navco*.

As Congress recognized in enacting ERISA, many funds operate in broad geographical areas and are hampered in their operations if subject to varying rules with regard to such basic functions as the collection of funds necessary to assure fund solvency. For that reason, assuring uniformity in the rules governing employee benefit plans is a central purpose of ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983).

Because of the current disarray on the MPPAA withdrawal liability limitations issue among the circuits, the many pension plans that operate within the jurisdiction of more than one of the five circuits which have spoken to this issue must have administrative systems in the various circuits operating under different time lines for the purpose of assessing and collecting withdrawal liability. To eliminate this disruptive disparity in the application of § 1451(f), this Court should grant certiorari and, as it has in two other recent cases raising issues concerning the assessment and collection of withdrawal liability under the MPPAA (*Schlitz, supra* and *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)), announce a uniform rule applicable to all multiemployer pension plans wherever they operate.

1. The Ninth Circuit, alone of the five circuits that have addressed the issue, holds that for purposes of the time limitations governing actions for recovery of withdrawal liability, a Fund's cause of action arises under that section on the day the employer permanently withdraws from the plan. App. 5a. As the other four circuits that have addressed the question have recognized, this result simply cannot be squared with the statutory scheme as a whole.

A. As *Schlitz* explained, the MPPAA "imposed a withdrawal charge on all employers withdrawing from an underfunded plan . . . [a]nd set forth a detailed set of rules for determining, and collecting, that charge." 115 S.Ct. at 985. The calculation of that charge is triggered once there has been a "complete withdrawal from a multiemployer plan," which occurs ordinarily when an employer "permanently ceases to have an obligation to contribute under the plan, or . . . permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a); *Concrete Pipe*, 508 U.S. at 610.[6]

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[6] There are special provisions for determining complete withdrawal in certain industries. § 1383(b), (c), (d) and (f); *see* p. 12, *infra*.

No obligation to pay wtihdrawal liability arises, however, on the date the withdrawal is deemed to occur. Rather, as this Court noted in *Schlitz*, while "[t]he statute . . . might make the withdrawing employer pay (or begin payment) on the date the employer actually withdraws . . . it does not do so." 115 S.Ct. at 987. Instead, the language in § 1399(b)(1) and (c)(2) "makes clear that the withdrawing employer owes nothing until its plan demands payment . . . ." *Id.* at 988; *see also id.* at 987 (noting that "[t]he statute says that a plan must draw up a schedule for payment and 'demand payment' as 'soon as practicable' after withdrawal . . . [and] adds that '[w]ithdrawal liability shall be payable . . . no more than 60 days after the date of the demand.' 29 U.S.C. § 1399(c)(2).")[7]

It is only once the withdrawal liability payments are "due and owing on the schedule set forth by the plan sponsor" that "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." § 1401(b)(1). Section 1451, in turn, provides that a plan fiduciary "adversely affected by the act or omission of any party . . . with respect to a multiemployer plan . . . may bring an action . . . six years after the date on which the cause of action arose." 29 U.S.C. § 1451(a)(1) and (f)(1).

[7] As *Schlitz* also explains, the statute requires that the plan permit the withdrawal liability to be paid either in a lump sum or in equal installments, and prescribes the method according to which the amount of each installment and the number of installments is to be calculated. Then, to be more precise than the Court had reason to be in *Schlitz*, the statute provides that "[w]ithdrawal liability shall be payable in accord with the schedule set forth by the plan . . . beginning no later than 60 days after the date of the demand." 29 U.S.C. § 1399(c)(2). As we explain later, the employer has no obligation to pay the *total* amount of the withdrawal liability any sooner than the mandatory installment plan payment schedule provides, unless the plan elects to accelerate the payment schedule to demand full payment because of payment default. *See* pp. 15-19, *infra*.

Given this statutory scheme, it is clear that "[t]he statute carefully distinguishes between the circumstances that define complete withdrawal and those which give rise to a cause of action." *Joyce v. Clyde Sandoz Masonry, supra*, 871 F.2d at 1123. The function of delineating the date of complete withdrawal is simply "to demarcate or to allow calculation of the employer's share, if any, of the plan's unfunded vested liability." *Id.* No "cause of action" "arises" on the date that complete withdrawal occurs because no employer payment obligation of any kind, capable of being breached, exists until well after that date.[8]

Instead, as the D.C. Circuit went on to explain in *Joyce*:

> The statute itself . . . indicates that the plan is "adversely affected" (and thus that a "cause of action" arises) when the plan has not received payments which are due and owing. The language of the statute (including the terms of section 1451 itself) points firmly in the direction of the conclusion that [the employer's] uncured failure to pay the sum demanded adversely affect[s] the plan, thus giving rise to a cause of action. *See* 29 U.S.C. §§ 1399(c)(5), 1401(b). . . . Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action. [871 F.2d at 1122-23, footnotes and citations omitted.]

In short, the Court of Appeals' analysis in this case fails because, unlike the D.C. Circuit's reasoning in *Joyce*, the Ninth Circuit ignored critical statutory language permitting plans to bring suit for withdrawal liability only *after* payments are "due and owing."

[8] Indeed, on the date of complete withdrawal, neither the plan sponsor nor the employer knows the amount of withdrawal liability or even whether the employer will owe anything. *See* § 1391(b)(1) (employer's proportional share of the plan's unfunded vested benefits may be "zero.")

B. This statutory language and structure analysis is more than sufficient to demonstrate why the D.C. Circuit was right and the Ninth Circuit wrong on the question here presented. Additionally, the D.C. Circuit's application of § 1451 in *Joyce* yields a result that accounts for the pertinent practical considerations, while the Ninth Circuit's statute of limitations theory is based on practical concerns that are fully met by statutory provisions quite separate from the limitations section.

On the one hand, the *Joyce* approach takes account, as the Ninth Circuit interpretation does not, of the fact that it is sometimes impossible to determine whether a complete withdrawal has occurred until years after the fact, as in cases of plant shutdowns or bargaining impasse. "This determination cannot necessarily be made upon complete withdrawal; rather it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123.

In the building and construction industry, the uncertainty is exacerbated. The MPPAA provides that complete withdrawal occurs on the date such an employer "ceases to have an obligation to contribute under the plan," but only if the employer "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." § 1383(b)(2)(B)(ii). As a result,

> the plan sponsor (or any other party) may not be able to establish that the building or construction industry employer has completely withdrawn until as much as five years after what the parties eventually determine to have been the date of complete withdrawal. To conclude that an event requiring such a post hoc (and belated) determination triggers the limitations bar would create, at the least, an unwieldy statutory collection mechanism. [*Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123-24.][9]

On the other hand, while the Ninth Circuit thought that its construction of § 1451 was necessary to assure that pension plan trustees promptly assess and collect withdrawal liability (App. 27a), MPPAA provisions entirely apart from the running of the statute of limitations provide powerful incentives for plan sponsors to expedite the process of assessing withdrawal liability.

Section 1399(b)(1) requires the plan sponsor to assess, schedule and demand withdrawal liability payment "[a]s soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). An employer may defend in arbitration against paying withdrawal liability on the ground that the plan sponsor failed to satisfy the "as soon as practicable" requirement. *Giroux Bros. Transportation, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d at 2, 4; *see Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1126-27. Thus, a

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[9] The Ninth Circuit purported to avoid this problem in *Thibodo* by holding that the statute of limitations runs not from the date defined by the statute as the "date of complete withdrawal"—namely, the "date of the cessation of the obligation to contribute or the cessation of covered operations" (§ 1383(e))—but, instead, from "the date on which the conditions for complete withdrawal . . . have been met"—that is, in the case of a construction industry employer who returns to the jurisdiction within five years, the date of that return. 34 F.3d at 917. In this case, however, the Ninth Circuit lost sight of that distinction, and instead construed and applied *Thibodo* as holding that "[i]n other words, the limitations period begins to run from the date of complete withdrawal." App. 4a.

If anything, *Thibodo* adds to the disarray in the courts of appeals in determining when a cause of action arises within the meaning of § 1451(f)(1), by suggesting that sometimes a cause of action arises after the date on which complete withdrawal is deemed to occur under the statute but still before the plan has assessed withdrawal liability, set a payment schedule, or made any demand for payment.

plan that is dilatory in assessing the withdrawal liability and demanding payment risks losing the right to collect the amount due.

Moreover, "[t]he plan sponsor that unduly delays in taking appropriate action . . . may invite a claim for breach of fiduciary duty." *Joyce*, 871 F.2d at 1126. Putting off the assessment and collection of withdrawal liability causes the plan to lose the investment value of money due to it, and may threaten the solvency of the fund.[10] Plan beneficiaries therefore could sue procrastinating trustees under ERISA, seeking to recover for the fund the earnings the withdrawal funds could have generated for the beneficiaries had those funds been timely assessed, collected and invested. *See* §§ 1145, 1399(c)(3), 1401(d), 1451(d).

Because other provisions of ERISA adequately assure timely assessment of and demand for withdrawal liability, there is no reason to contort the provisions governing the statutory limitations period on filing collection lawsuits, as the Ninth Circuit did here, in order to serve ends for which those provisions were not intended.

2. While disagreeing uniformly with the Ninth Circuit's erroneous interpretation of § 1451(f)(1), other circuits have adopted at least two other inconsistent and incompatible interpretations of that provision:

The Seventh Circuit holds that once there is the requisite demand for payment of withdrawal liability and the employer fails to make a single installment payment under the schedule set out by the plan sponsor, the limitations period *on the entire withdrawal liability* begins to run. According to the Seventh Circuit, unless the plan sues for

[10] The amount of the amortization interest built into the payment schedule is fixed by the statute no matter when collection actually occurs. *Schlitz*, 115 S.Ct. at 990. Consequently, if the plan trustees do not promptly assess withdrawal liability, the plan will not collect interest for the period of the delay.

the entire amount within the statutory limitations period as figured from the first missed payment, it loses the right to sue for *any* of the installments due later. *Central States Pension Fund v. Navco, supra*, 3 F.3d at 172.

The Third Circuit, in *Dist. 15, Machinists Pension Fund v. Kahle Engineering Corp., supra*, expressly rejected the *Navco* approach as "unpersuasive." 43 F.3d at 858. *Kahle* holds instead that, unless the plan chooses to accelerate the entire debt after a missed payment under § 1399(c)(5), as it "may" do, the limitations period runs from each missed installment payment, with respect to collection of that payment.[11]

On the facts of this case, the difference between the Third and Seventh Circuit positions is determinative. The collection suit in this case was filed more than six years (by eight days) after the first missed payment was due, but less than six years after every other installment payment (as well as the alternative, lump sum payment) was due, and less than six years before the plan *could* have insisted on accelerating payment of the entire debt under the statute had it wished to.[12] Under the Seventh Cir-

[11] Neither the D.C. Circuit in *Clyde Sandoz Masonry* nor the First Circuit in *Giroux* squarely addressed the question on which the *Navco* and *Kahle Engineering* opinions are in conflict. The reasoning of *Clyde Sandoz Masonry*, however, favors the *Kahle Engineering* approach. 871 F.2d at 1124 (the cause of action arises "based on the adverse effect on the plan of failure to receive demanded payment," and the plan may, but need not, make demand for "the entire amount of withdrawal liability," but only *after* default on a payment); *see Kahle Engineering*, 43 F.3d at 860 (reading *Clyde Sandoz Masonry* as supporting the *Kahle Engineering* interpretation).

[12] Under the statute and implementing regulations, the plan may not accelerate the payment schedule and demand payment in full during the period allowed for appeals and arbitration challenging the liability assessed. § 1451(a)(1); *Kahle Engineering Corp.*, 43 F.3d at 855 ("[i]f an employer misses a scheduled [interim] payment, the fund may seek to collect by filing a collection action

cuit's *Navco* interpretation of the statute, the suit is barred (as the District Court in this case alternatively held); under the Third Circuit's *Kahle Engineering* analysis, the only possible impact of § 1451(f)(1) would be to bar collection of the first unpaid installment payment.

The *Kahle Engineering* analysis is faithful to the statutory scheme, as a whole, while that of the Seventh Circuit in *Navco* is not.

The premise of the *Navco* holding is that "[a]lthough a fund *may* permit an employer to amortize [withdrawal liability] over twenty years . . . the whole amount is presumptively due at the outset." 3 F.3d at 172 (emphasis supplied). That premise is simply wrong.

As this Court made clear in *Schlitz*, the statute itself establishes the installment payment option for employers, the amount of each annual payment, and the number of such annual payments that may be required. 115 S.Ct. at 986; § 1399(c)(1). Under the statute, the *only* statutory obligation of the employer at the time of the first missed payment was to pay that installment. The plan therefore *could not* sue at that juncture, even if it wished to, for more than that single payment. *See* §§ 1399(c)(1)(A), (2), and (4) (obligation is to pay according to the installment schedule); 1451(b) (in an action to compel payment of withdrawal liability, "any failure of the employer to make any withdrawal liability payment shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).")

It is true, of course, that the MPPAA allows, *but does not require*, a plan sponsor faced with the default of a withdrawing employer on one or more scheduled pay-

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but it may not accelerate the balance during that protected arbitration period.") *See also Trustees of the Plumbers and Pipefitters National Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 624 (5th Cir. 1994).

ments to accelerate the employer's obligation to pay the full amount of withdrawal liability.[13] Such default and acceleration "provide[] the predicate for a plan sponsor's suit" for the full amount of withdrawal liability (*Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123), but only if the plan sponsor *elects* to accelerate.[14]

By insisting that "the whole sum becomes due and the whole claim accrues when the first payment is missed" *Navco* "in effect imposes a compulsory acceleration clause," although the statute in terms provides a discretionary one, and one that can be invoked necessarily only after the first payment is due under the plan's demand. *Kahle Engineering*, 43 F.3d at 859. The *Navco* holding is therefore at odds with the statute's plain language.

The *Kahle Engineering* analysis, in contrast, gives effect to both the obligation to permit installment payments

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[13] Section 1399(c)(5) provides:

> In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability of the employer from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—
>
> (A) the failure of the employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

[14] The analysis in the text is intentionally simplified to apply to *any* missed payment. We reiterate, however, that at the outset of the payment schedule the Seventh Circuit's interpretation is particularly untenable, since the option the plan otherwise has to accelerate the entire debt if it wishes to and demand payment of all of the withdrawal liability does not come into existence until after the period for demanding arbitration has passed—which it had not as of February 1, 1987 in this case. *See* n.12, *supra*.

and the optional nature of debt acceleration when one of the payments is missed. As the Third Circuit explained:

> the employer's obligation to make the scheduled payments is akin to the obligation to make installment payments. In an installment payment contract, a new cause of action arises from the date each payment is missed. [43 F.3d at 857].

See also Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc., 948 F.2d 1219, 1223 (11th Cir. 1991) ("with respect to each withdrawal liability installment, the right to sue [under 29 U.S.C. § 1451] is triggered by the failure to pay the installment within the prescribed time," *i.e.*, at the due date of each installment).[15]

The *Kahle* interpretation is not only more consistent with the statutory language and structure but also avoids "perverse incentives" that the *Navco* rule creates. *Kahle Engineering*, 43 F.3d at 859. Maintaining the flexibility of the plan *not* to accelerate the debt when a payment is missed "[en]courages amicable resolution of disputes and . . . reentry into the fund as a contributing employer." *Id.* To force acceleration of the debt when the first missed payment occurs would preclude an accommodating fund from suing on any payment missed more than six years after the first, and could require a plan to sue for the

[15] As *Kahle* went on to note, where there is an installment sales contract, the statute of limitations begins to run separately against each installment when that installment becomes due, whether or not the debtor has the option to pay the entire indebtedness at any time and whether or not the creditor has "'the right upon certain contingencies to declare the whole sum due . . . unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option.'" *Kahle Engineering*, 43 F.3d at 857, *quoting* 51 Am.Jur.2d: Limitations of Actions § 133; *see Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc.*, 948 F.2d at 1222-24.

This Court in *Schlitz* confirmed that the method of paying withdrawal liability under the statute is akin to contractual installment payments. 115 S.Ct. at 988.

entire amount rather than for the past overdue payments alone even where doing so would make the employer insolvent (and therefore unable to make the later payments as they become due). Insisting upon draconian enforcement of the obligation to pay withdrawal liability does not benefit any of the potentially affected parties—the employer, the plan, or the plan beneficiaries.

CONCLUSION

The question presented here—when a cause of action for an employer's failure to fulfill its withdrawal liability obligation arises—affects employers, pension plans, and employees throughout the nation. The Courts of Appeals are in disarray on these issues, taking several inconsistent and incompatible positions. This case is well-suited for a definitive decision by this Court, because the facts of the case raise every one of the various interpretive permutations adopted by the courts of appeals. This Court should therefore grant this petition for writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 94-15976

BAY AREA LAUNDRY & DRY CLEANING PENSION TRUST FUND,
Plaintiff-Appellant,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., a California Corporation; FERREIRA FARMS, INC., a California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Nov. 16, 1995
Decided Jan. 17, 1996

Before: NORRIS, BEEZER, and TROTT, Circuit Judges.

PER CURIAM:

This case arises from an action filed on February 9, 1993, by the Bay Area Laundry and Dry Cleaning Pension Trust Fund against Ferbar Corp. and Stephen J. Barnes ("Ferbar") to collect withdrawal liability under 29 U.S.C. §§ 1381-1461, the Multi-Employer Pension

Plan Amendments Act of the Employee Retirement Income Security Act. The district court granted summary judgment for Ferbar on the ground that the Fund's suit for withdrawal liability was barred by the applicable statute of limitations set forth in 29 U.S.C. § 1451(f). This statute provides in relevant part:

> § 1451. Civil Actions . . .
>
> (f) Time limitations. An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; . . . .

29 U.S.C. § 1451(f). The district court applied the three-year statute of limitations set forth in § 1451(f)(2), but in the alternative held that the action would nevertheless be barred under the six-year statute of limitations set forth in § 1451(f)(1), reasoning that the cause of action arose on the date that Ferbar missed its first withdrawal liability installment payment. On appeal the parties contest, first, whether the three-year or the six-year period applies, and second, the date on which the limitations period began to run.

I

BACKGROUND

In March, 1985, Ferbar effected a complete withdrawal from the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. The notice provided that Ferbar could pay off its withdrawal liability in one of two ways: (1) it could either make a single lump-sum payment of the total liability no later than 60 days after receipt of the demand, or (2) it could begin making installment pay-

-ments according to a schedule established by the Fund, with the first payment due on February 1, 1987. Ferbar did not pay the first installment, but rather on February 27, 1987, exercised its right to request review of the assessment by the Board of Trustees. On April 14, 1987, the Fund notified Ferbar that Ferbar's first payment was delinquent, and informed Ferbar that it had 60 days from the notice to cure the delinquency, or it would be considered in default. Ferbar did not cure its delinquency.

II

APPLICABLE LIMITATIONS PERIOD

The district court held that the Fund's action was time-barred because it was filed more than three years after the Fund acquired knowledge of the cause of action, citing § 1451(f)(2). The Fund argues that the action could not be time-barred until six years after the cause of action arose.

We agree with the Fund. The district court misread the plain language of § 1451(f), which clearly directs courts to apply "the later of" the two periods of limitations. On the facts of this case, "the later of" the two periods is six years from the date the cause of action arose. We now turn to the question when the cause of action arose.

III

WHEN THE CAUSE OF ACTION AROSE

In its alternative holding, the district court determined that the cause of action arose on February 1, 1987, the date on which Ferbar missed its first installment payment for the assessed withdrawal liability. The Fund argues that the cause of action arose on June 14, 1987, the date of default.[1] Ferbar argues that the cause of action arose

[1] Default occurs when the employer has received notice that it has missed a payment and has failed to cure the delinquency within 60 days. *See* 29 U.S.C. § 1399(c)(5) (defining "default").

in March, 1985, the date of complete withdrawal, or alternatively on the date of the first missed payment.

Our court has recently spoken dispositively on this issue. In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir.1994), we held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-17. In other words, the limitations period begins to run from the date of complete withdrawal—in this case, March 1985.

It is true that *Thibodo* by its terms applies only to actions arising under 29 U.S.C. § 1383(b), which defines the conditions for complete withdrawal only in the building and construction industry.[2] The conditions for complete withdrawal in most other industries are defined by

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[2] § 1383(b) provides:

§ 1383. Complete Withdrawal . . .

(b) Building and construction industry.

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry . . .

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. § 1383(b).

§ 1383(a), which governs the present action.[3] However, we see no basis for distinguishing an action brought under § 1383(a) from one brought under § 1383(b) for the purpose of applying the statute of limitations set forth in § 1451(f). Indeed, the Fund makes no attempt to distinguish *Thibodo* from the present action for statute of limitations purposes. Accordingly, we hold that *Thibodo* controls actions arising under § 1383(a) as well as actions arising under § 1383(b).

Under *Thibodo*, the period of limitations began running in March, 1985, when Ferbar effected a complete withdrawal from the Fund.[4] Because the Fund filed the present action on February 9, 1993, more than six years later, we AFFIRM the summary judgment for Ferbar on the ground that the action is time-barred.

TROTT, Circuit Judge, concurring.

I concur in Judge Norris's opinion because I believe *Thibodo* compels this result. I believe, however, that *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.) does a better job of answering the questions raised by these issues, but we do not have authority to ignore our own decisions.

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[3] § 1383(a) provides:

(a) Determinative factors.

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1383(a).

[4] Ferbar never agreed to the installment plan proposed by the Fund and made no installment payments. As a result, it appears that no new contract to pay off the withdrawal liability could have been formed. *See* 1A Arthur L. Corbin, *Corbin on Contracts* § 211 (1963). Had such a contract been formed, the Fund might have a separate claim, with its own statute of limitations, for breach of that contract.

APPENDIX B

[Filed May 9, 1994]

No. C-93-0489 DLJ

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Plaintiffs,

v.

FERBAR CORP., FERREIRA FARMS, INC., DIABLO CLEANERS, INC., STEPHEN BARNES and ROBERT FERREIRA,
Defendants.

ORDER

Following oral argument and the submission of supplemental briefing on December 22, 1993, the parties' cross-motions for summary judgment in this matter were before the Court. Geoffrey White represented plaintiffs; defendants Ferbar Corporation and Stephen Barnes were represented by William Terheyden of Littler, Mendelson, Fastiff, Tichy & Mathiason. Having considered the papers submitted and the applicable law, the Court now finds the applicable statute of limitations has lapsed, and grants summary judgment in favor of defendants Ferbar and Barnes.

BACKGROUND

I. *Factual Background and Procedural History*

Plaintiffs bring this action under 29 U.S.C. §§ 1381-1461, ERISA's Multi-Employer Pension Plan Amendments Act. It is defendants' position that they were not obligated under a collective bargaining agreement to contribute to an employee trust fund. For purposes of this

summary adjudication, however, defendants acknowledge making contributions for several years to a Fund for the benefit of three business locations—Superior French Laundry, One Hour Martinizing and Diablo Cleaners. These contributions were discontinued to Diablo Cleaners in February of 1983, at which time Ferbar no longer owned Diablo Cleaners. Defendants' Mot. for Sum. J. at 2.

In March of 1985, Ferbar ceased altogether to make contributions to the remaining locations, following submission of a petition by a majority of the employees working at Superior French Laundry and One Hour Martinizing which indicated they no longer wanted union representation. Plaintiffs' Opp'n Mot. at 2; Defendants' Mot. for Sum. J. at 2.

On December 12, 1986, plaintiffs sent a notice to Superior French Laundry, asserting a withdrawal liability obligation of $45,580.80. Plaintiffs' Opp'n Mot. at 2. That notice provided that Superior French would be able to satisfy this debt in one of two ways: Superior French could (1) make a single lump-sum payment of the total withdrawal liability no later than sixty days after the demand; or (2) begin making installment payments of withdrawal liability pursuant to a schedule set forth by the Trust Fund, with the first monthly payment due on February 1, 1987. Plaintiffs' Opp'n Mot. at 2.

Defendants since then have made no payments on the withdrawal liability. On February 27, 1987, Ferbar requested a review of the plaintiffs' assessment. Plaintiffs' Opp'n Mot. at 2. By letter dated April 14, 1987, the Fund notified Ferbar it was delinquent, and that Ferbar had sixty days from the date of notice to cure the delinquency, or it would be considered in default. *Id.* Plaintiffs filed this lawsuit on February 9, 1993.

II. *Legal Standard*

The Federal Rules of Civil Procedure provide for summary adjudication where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1983)).

In contrast to a plaintiff's motion for summary judgment, a defendant's motion for summary judgment faces a lighter burden. Because the defendant does not bear the burden of proof at trial, the defendant need only point to the insufficiency of the plaintiff's evidence to shift the burden to the plaintiff to raise genuine issues of fact as to each claim by substantial evidence. *T.W. Electric* at 630, *citing Celotex* at 2553. If plaintiff fails to raise a genuine issue of fact, then summary adjudication in favor of the defendant will be granted.

DISCUSSION

The Court's decision in this matter depends on an interpretation of 29 U.S.C. § 1451, that portion of the Multi-Employer Pension Plan Amendment Act defining the relevant statute of limitations. That section provides:

> (f) An action under this section may not be brought after the later of—

> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

A. *The Applicability of 29 U.S.C. § 1451(f)(2)'s Three-Year Statute of Limitations*

Defendants argue that the shorter of the two statutes of limitations applies—and acts as a bar—to the present action. This shorter, three year statute of limitations, *see* § 1451(f)(2), applies to instances in which the plaintiff has actual or constructive knowledge of the accrual of a cause of action. Notwithstanding the scarcity of case law invoking § 1451(f)(2) with respect to cases involving withdrawal liability, it is the conclusion of the Court that this section applies in the present instance.

It is a canon of statutory construction that, where possible, a statute be interpreted to give effect to all its component parts. *Reiter v. Sonotone Corp.*, 99 S. Ct. 2326, 2331 (1979). To give such meaning to § 1451(f), a three-year statute is interposed in those instances where a plaintiff does or should know of the existence of a cause of action, except in instances of fraud or concealment.

The immediate problem with plaintiffs' attempt to apply a six year statute to all aspects of the present action is reflected in their assertion that the six year statute is triggered only after their knowledge of defendants' default. Specifically, plaintiffs argue that the statute cannot be found to run until defendants failed to make payment following sixty days after they received notice of the delinquency. Plaintiffs' Opp'n at 8. On its face, this argument twists the very premises of § 1451(f) by combining

the six year provision of § 1451(f)(1) with the knowledge component of § 1451(f)(2). The argument is, accordingly, flawed since the six year statute cannot correspond to instances in which such knowledge is conceded.

Plaintiffs attempt variously to justify their assertion of the inapplicability of the three year statute of limitations to the present case. Initially, plaintiffs argue § 1451(f)(2) can be given effect since the section applies to other cases not involving withdrawal liability. Such application, according to plaintiffs, proves that the three year statute is not rendered meaningless since it would continue to apply to other causes of action under Subtitle E of Title IV of ERISA, *e.g.* reorganizations, mergers, transfers of assets, insolvency and termination. *See* Plaintiffs' Sup. Mot. at 10-11; *see also Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1125 (D.C. Cir.), *cert. denied*, 110 S. Ct. 280 (1989). "The fact that one prong of the general statute of limitations contained at 29 U.S.C. § 1451(f) may not have applicability to one particular provision in the subtitle does not mean that it is surplusage with respect to all other provisions." *Id.*

Plaintiffs further argue that "the 'discovery' prong of the limitations period can also apply directly to some aspects of collection of withdrawal liability." Plaintiffs' Sup. Mot. at 11. For example, plaintiffs argue that § 1451(f)(2) is given effect in instances where an employer's inability to make further payments of withdrawal liability constitutes a default under Plan regulations allowing acceleration of withdrawal liability. *Id.; see also Joyce*, 871 F.2d at 1125.

These arguments are unavailing, for the reason that plaintiffs have elicited no statutory or case law, nor any indicia of Congressional intent, supporting such a reading. While plaintiffs have presented the Court with scenarios in which the three year statute might alternatively be applied, and therefore given meaning, plaintiffs have neglected to proffer any sufficient reasons why § 1451(f)(2) should

be so limited. In the absence of such support, the Court must assume that Congress meant what it said in deeming the three year statute in § 1451(f)(2) applicable to all of Subtitle E of Title IV of ERISA. *See* § 1451(a)(1).

The three year statute of § 1451(f)(2) thus applies to the present action. As plaintiffs knew a cause of action existed no later than 1987, *see* Defendants' Sup. Mot. at 4 n.1, 5, yet filed their complaint in excess of three years of that time, the present action is barred by the applicable statute of limitations.

B. *Even Were the Six Year Statute of Limitations Deemed Applicable, the Present Case Would Still be Barred Since the Statute Begins Running at the Date of the First Omitted Payment*

Applying the six year statute of limitations urged by plaintiffs would not, in any event, affect the Court's conclusion that the present action is statutorily time-barred. In making the argument, whether primarily or alternatively, that the six year statute applies, the point of dispute among the parties centers upon the date the statue is deemed triggered. Defendants argue the statute begins to run from the moment an employer withdraws from a fund; plaintiffs argue the statute begins to run once an employer misses on contribution payments and then fails to cure that failure following receipt of notice of default.

It is the conclusion of this Court that the answer falls between these two suggestions. Although the Ninth Circuit has not answered the question, the running of the six-year statute is appropriately found to begin at the date that an employer first fails to make a payment pursuant to the governing schedule.

This outcome follows a sensible application of the statute, and the direction of applicable case law. Title 29 U.S.C. § 1399(c)(2) provides:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan's sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

Here, plaintiffs had set forth a schedule under which payment was due, at the latest, February 1, 1987. Though defendants failed to meet that schedule, plaintiffs argue such non-payment alone cannot give rise to a cause of action, since the non-payment could subsequently have been cured.[1] It is the opinion of the Court, however, that there has been sufficient adverse action at the very moment a payment becomes overdue to trigger the statute of limitations.

The applicable PBGC regulations distinguish between the term "overdue" and the term "default." Title 29 C.F.R. § 2644.2(a) provides that withdrawal liability is "overdue" if unpaid at the date set forth in the applicable schedule. "Default," by contrast, is defined as occurring sixty days after the employer receives written notification from the plan's sponsor that the payment is overdue. *See* 29 C.F.R. § 2544.2(b)(i). It is when a payment is overdue, and not in default, that a cognizable injury occurs which triggers the statute of limitations.

The facts of the present case well illustrate that, upon the first payment becoming overdue, there was adverse action. In their December 12, 1986 letter to defendants, plaintiffs wrote that defendants would be incurring inter-

[1] Plaintiffs also argue that "the Plan must allow a *minimum* of sixty days after the date of the demand for the employer to commence making installment payments of withdrawal liability under 29 U.S.C. § 1399(c)(2)." Plaintiffs' Sup. Mot. at 4-5. Plaintiffs concede the absence of any supporting case law for this position. Further, § 1399 merely provides that "[w]ithdrawal liability shall be payable . . . *no later than* 60 days after the date of demand. . . ." 29 U.S.C. § 1399(c)(2) (emphasis added).

est charges if they failed to timely make the first monthly payment. *See* Defendants' Sup. Mot. at 8-9. Further, the letter stated that defendants might "incur liability for liquidated damages and other sums assessed in other delinquency provisions of the Plan's Trust agreement; and your obligation may be subject to such additional steps as the Trustees may require in accordance with the law." *Id.* at 9; Barnes Decl. at Exh. A. Thus, plaintiffs were adversely affected when the first monthly payment was not made by the February 1 date. At that time, then, plaintiffs' cause of action arose and, concomitantly, the statute of limitations began running.

This holding is in accord with the holdings of those decisions involving the issue in question. In *Joyce, supra,* the District of Columbia Circuit held that a cause of action arose not on the date of the employer's withdrawal from a fund, but from the time a plan demanded payment and the employer refused to comply with the demand.

> When, and only when, the employer fails to meet that demanded schedule of payments (and fails to cure that failure) has the plan been harmed (and thus becomes entitled to maintain its claim against the employer).

871 F.2d at 1124. *See also ILGWU National Retirement Fund v. Smart Modes of Calif., Inc.*, 735 F. Supp. 103 (S.D.N.Y. 1990) (characterizing *Joyce* as a "well-reasoned and thorough opinion"). Similarly, in *Chicago Truck Drivers Pension Fund v. Van Vorst Indus.*, 800 F. Supp. 587 (N.D. Ill. 1992), *aff'd, Central States, Southeast & Southwest Areas Pension Fund v. Navco,* 3 F.3d 167 (7th Cir. 1993), the court concluded that the claim accrued at the time the first payment was due. Numerous unpublished opinions are also in accord. *See Debreceni v. Westfair Transport Corp.*, 1988 U.S. Dist. LEXIS 9527 (D. Mass. 1988); *Central States, Southeast & Southwest Areas*

Pension Fund v. Cherry Branch Properties, 1991 U.S. Dist. LEXIS 14350 (N.D. Ill. 1991).[2]

Plaintiffs argue the accrual of a cause of action cannot be designated as the date of the first missed payment, since such a decision would "create serious impediments . . . because of minor delinquencies during the administrative process." Plaintiffs' Sup. Mot. at 8. Plaintiffs pose the specter of an employer who misses his first installment payment, then timely pays installments for the next six years, and thereafter stops all further payments. *See id.* Plaintiffs argue that if the first missed payment triggers the statute of limitations, then the fund would be barred from attempting to collect the succeeding, owed payments. This concern is unfounded, however. While the first, missed payment in the hypothetical would be time-barred, a new cause of action would have arisen from the time the payments were stopped.

The parties suggest the Court adopt other alternatives in determining the appropriate trigger for withdrawal liability. The breadth of these proffered solutions stems largely from a dictum in a Ninth Circuit opinion, which inaccurately depicts the degree of difference among courts addressing the very question now considered. In *Brentwood Financial v. Teamsters Pension Trust Fund*, 902 F.2d 1456 (9th Cir. 1990) (declining to adopt a theory when the statute of limitations was triggered for withdrawal liability actions), the Court wrote:

> Although this court has not considered the question of when the six-year statute of limitations begins to run, other courts have addressed and split on this issue. The Seventh Circuit concluded that the limitations period begins to run when a 'complete withdrawal' occurs. *See Trustees of Ironworkers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir.), *cert. denied*, 110 S.Ct. 143 (1989). The District of Columbia Circuit held, however, that the limitation period begins to run from the time the employer first fails to make the withdrawal payment demanded by the Plan. *See Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1122 (D.C.Cir.), *cert. denied*, 110 S. Ct. 280 (1989).

[2] Few decisions appear to hold to the contrary. *But see, e.g., Connors v. Peles*, 724 F. Supp. 1538, 1578-79 (W.D. Pa. 1989) (finding, without analysis, that "Plaintiffs' cause of action accrued on . . . the date at which [defendant] no longer became obligated to contribute to the Pension Fund.").

Defendants wield this language in arguing that the statute of limitations began running when defendants withdrew from the Fund. Plaintiffs, however, argue correctly that the Ninth Circuit wrongly framed the issue by inaccurately citing a Seventh Circuit case for the proposition that the limitations period begins to run when a "complete withdrawal" occurs. Plaintiffs' Opp'n Mot. at 7. That referenced opinion, *Iron Workers, supra*, does not once cite section 1451(f) or contain any discussion of a statute of limitations; instead, the opinion examines an employer's date of withdrawal from a fund only in order to ascertain the amount of withdrawal liability incurred. *Cf. Cherry Branch Properties, supra*, 1991 U.S. Dist. LEXIS 14350 (unpublished) ("*Ironworkers* . . . does not confront the issue. . . . Thus we find the Ninth Circuit's recent discussion of the two cases unenlightening [since] its recitation of the Seventh Circuit's conclusion . . . is flatly wrong."). Other than the unelaborated assertion "that how the Ninth Circuit reads *Ironworkers Local 473 Pension Trust* controls the parties in the instant case", Reply at 2, defendants do not defend the accuracy of the Ninth Circuit's characterization of *Iron Workers*.

Apart from the lack of supporting case law, it is clear that the date of withdrawal would be an inappropriate point at which to begin the running of the statute of limitations for withdrawal liability cases. Defendants argue that "[if] the statute of limitations is not deemed to run

from the time of withdrawal. . ., there is no incentive for a trust fund to make its calculations and attempt to obtain payment. It could take as long as it wants to impose the liability if the period of limitations does not begin to run until the imposition is made and the payment not made . . . and a company that withdrew may be hit with withdrawal liability many years after withdrawal and after relying on the fact that it owed no withdrawal liability as it never heard from the trust fund." Defendants' Sup. Mot. at 6.

This argument is unpersuasive. Most important, defendants have failed to cite any evidence that Congress actually intended that the statute of limitations would be triggered at the moment of withdrawal. Further, defendants' recitation of the evil effects which would ensue from setting the trigger date after the time of withdrawal is suspect, as there is *not* an incentive for a trustee to postpone making a claim of withdrawal liability. To the contrary, it is a trustee's statutory duty to timely protect the interests of the Plan. *See* § 1399(b)(1) (providing that a fund, [a]s soon as practicable after an employer's complete . . . withdrawal" (1) calculate the employer's withdrawal liability, (2) set forth a schedule of payments, and (3) demand that the employer make payments pursuant to that schedule). Moreover, there is obvious risk involved in the event a trustee delays collection, and necessary cost incurred by collecting later rather than sooner. Finally, to the extent an employer is concerned about determining the existence or extent of future withdrawal liability, then that employer may at his own behest make such inquiry at the onset of his withdrawal. Defendants' concerns are thus unfounded that, if the statute is not triggered at the moment of withdrawal, a trustee will delay collection of payment in order to extend the statute of limitations.

Plaintiffs' argument as to when the statute of limitations should be deemed triggered is similarly unpersuasive. Plaintiffs suggest that failure to make the payment triggers

liability only with respect to interest charges, but that no default can occur until an employer fails to make payment and, after receiving notice of the delinquency, fails to cure that delinquency within a specified period of time. Plaintiffs' Opp'n at 8. As applied to the present case, plaintiffs argue that a cause of action by a fund to collect withdrawal liability does not begin until (1) the fund has assessed liability against the employer; (2) the employer has failed to make a payment due on the schedule; and (3) the employer has failed to cure its delinquency within 60 days *after notice* by the fund. *Id.* Under this theory, since plaintiffs did not give notice to defendant of its delinquency until a letter dated April 14, 1987, defendants still had 60 days from that date to cure their failure to pay, thereby placing the expiration date of the statute of limitations on June 14 1993. Plaintiffs' Opp'n at 1.

Plaintiffs argue that "the text of the Assessment plainly states, even though the monthly payments are to begin on February 1, failure to make the payment triggers liability for interest charges, but no 'default' can occur until the Defendants fail to make payment following 60 days after receiving notice of the delinquency." Plaintiffs' Opp'n at 8.

Plaintiffs' interpretation is unavailing for various reasons. First, it is unsupported by case law. Plaintiffs latch on to language in *Joyce* that "[the] *uncured* failure to pay the sum demanded [gives] rise to the cause of action." 871 F.2d at 1122 (emphasis added). There, however, the District of Columbia Circuit continued that "the plan sponsor's demand for payment triggers the employer's obligation to pay, and the employer's failure to make the scheduled payment in turn provides the predicate for a plan sponsor's suit. That is to say, the failure to pay gives rise to a cause of action." *Id.* at 1122-23. Most significantly, the holding of that case does not postpone the trigger for the statute of limitations in the manner sought by plaintiffs.

Similarly, *Navco*, *supra*, is also unsupportive of plaintiffs' position. Plaintiffs cite the language of *Navco* that "[a]s soon as the 60-day grace period provided by § 1399(c)(2) expired, the funds could have commenced suit. They had been injured. That is the standard definition of the 'accrual' of a claim." 3 F.3d at 171. The Court continued, however, that "the claim accrues as soon as payment becomes overdue." *Id.* at 172. Moreover, there, too, the court did not in its holding expressly postpone the triggering of the statute of limitations.

No case has been cited to the Court in which a court held the staute of limitations of § 1451(f) was tolled until after default and subsequent expiration of a designated time period. This absence is understandable, since the predictability sought by implementation of a statute of limitation would be undercut by such an interpretation. Allowing the grace period suggested would enable an injured fund to toll a statute of limitations by virtue of having neglected to formally notify an employer of a forthcoming default, though an owing payment was already overdue. The absence of case law supporting plaintiffs' position is also understandable since, whether set at three or six years, the governing statute of limitations is a lengthy one, for which resort to extenuating methods of tolling has proved seldom necessary.

In conclusion, then, even were the six year statute to apply, the present action would be barred. Defendants were obligated—and failed—to make the first required withdrawal liability payment on February 1, 1987, a date preceding the filing of the lawsuit by more than six years. *See* Defendants' Mot. for Sum. J. at 7; Plaintiffs' Opp'n at 8. Accordingly, the present action is time-barred, and summary judgment is appropriately granted in favor of defendant Ferbar Corporation and defendant Stephen Barnes.

CONCLUSION

For the foregoing reasons, the Court Orders as follows: The motion for summary judgment submitted on behalf

of defendants Ferbar Corporation and Stephen Barnes is GRANTED. Partial judgment shall be entered accordingly. A status conference shall occur among the remaining parties to this action on May 25, 1994 at 8:30 a.m.; all other dates currently scheduled are hereby vacated.

IT IS SO ORDERED.

Dated: May 9, 1994.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

[Filed May 13, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15976
D.C. No. CV-93-00489-DLJ

BAY AREA LAUNDRY & DRY CLEANING PENSION TRUST FUND,
Plaintiff-Appellant,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., a California Corporation; FERREIRA FARMS, INC., a California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA
Defendants-Appellees.

ORDER

Before: NORRIS, BEEZER, and TROTT, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Beezer and Trott have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 93-55079, 93-55080

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Plaintiff-Appellant,

v.

RUSSELL L. THIBODO; GARY R. THIBODO; THIBODO CONSTRUCTION CO. INC.; DRAINAGE CONSTRUCTION CO.,
Defendants-Appellees.

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Plaintiff-Appellant-Appellee,

v.

RUSSELL L. THIBODO; THIBODO CONSTRUCTION CO. INC.,
Defendants-Appellees-Appellants.

Appeals from the United States District Court
for the Central District of California

Argued and Submitted June 8, 1994

Decided Sept. 12, 1994

Before: FLETCHER, CANBY and HALL, Circuit Judges.

CANBY, Circuit Judge:

The Board of Trustees of the Construction Laborers' Pension Trust for Southern California appeals the district

court's dismissal of this action in which the Trustees sought to enforce an arbitration award. The arbitrator had determined that Russell Thibodo was personally liable to the Trust for ERISA withdrawal liability incurred as a result of his construction company's complete withdrawal from the Construction Laborers Pension Plan in 1983. The district court, however, held that the Trustees' action was barred by ERISA's six-year statute of limitations.

We reverse and remand to the district court.[1]

STATUTORY BACKGROUND

ERISA, as modified by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), is designed to ensure the financial integrity of multiemployer pension funds. *See generally Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C.Cir.), *cert. denied*, 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989) One mechanism for attaining this goal is the Act's requirement that employers who withdraw from multiemployer plans remain liable for a statutory share of the plan's "unfunded vested benefits." *See* 29 U.S.C. §§ 1381, 1399; *Joyce*, 871 F.2d at 1120.

Much of the confusion surrounding this case is due to the fact that, at least with regard to the construction industry, when "complete withdrawal" occurs is determined differently under two different sections. The first determination under 29 U.S.C. § 1383(b)(2) is for the purpose of establishing whether the employer has, in fact, withdrawn and liability for continuing contributions has ended. The second determination is for the purpose of establishing the amount of withdrawal liability. The former determination is made under sections 1383(b)(2)(A) and (B). An employer is deemed to have completely withdrawn from the plan if:

[1] Thibodo cross-appeals the district court's denial of his motion for attorneys' fees. In light of our disposition, we dismiss the cross-appeal as moot.

> (A) [the] employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer—
>
> (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
>
> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption,

29 U.S.C. §§ 1383(b)(2)(A), (B). It may readily be seen that conditions (A) and (B) may not be met for up to 5 years after an employer's duty to make regular contributions to the fund has ceased. Indeed, as we will see, the employer in the present case did not effectuate "complete withdrawal" until two years after it ceased contributions to the plan.

Different statutory provisions, however, determine the "date of complete withdrawal" for purposes of calculating the amount of withdrawal liability. For that purpose, the date of "complete withdrawal" is deemed to be the "date of the cessation of the obligation to contribute." 29 U.S.C. § 1383(e). This date, or, more accurately, the year in which this date falls, is instrumental in determining the amount of the employer's withdrawal liability. *See* 29 U.S.C. § 1391(b)(2) (amount of unfunded vested benefits that existed on the last date of the plan year preceding the year in which the employer withdrew is the amount for which the employer owes a contribution).

Civil actions to collect unpaid withdrawal liability amounts may not be brought after the later off: (1) six years after the date on which the cause of action arose; or (2) three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action, with one

exception not relevant to this case. *See* 29 U.S.C. § 1451(f).

FACTUAL BACKGROUND

The Trust is the plan sponsor for the Construction Laborers Pension Plan (the Plan). Thibodo Construction Co., Inc. contributed to the Plan pursuant to its collective bargaining agreement (CBA) with the Laborers Union until June 15, 1983, the date upon which the CBA expired. In early 1984, the Trustees believed that the company had withdrawn from the Plan and therefore owed withdrawal liability as provided in ERISA under the MPPAA. They sent the company an assessment notification and payment schedule. The company disputed the assessment, however, and in July 1984 the Trustees agreed that the assessment was erroneous because the company had not employed any laborers since the expiration of its CBA with the union. *See* 29 U.S.C. § 1383(b)(2)(B). The Trustees warned, however, that the company would owe withdrawal liability if it resumed hiring laborers.

In the Spring of 1985, the company resumed hiring laborers to perform work within the jurisdiction of the Plan. When the Trustees became aware of this resumption, they reinstated the company's withdrawal liability assessment, but the company made no payments to the Plan in response to the assessment. Nothing more transpired until April 1986, when the Trustees notified the company that it must begin making payments on the assessment within 60 days. Having received no payments from the company, the Trustees initiated this lawsuit in the district court on June 20, 1989, six years and five days after the expiration of the company's CBA.

The district court agreed to stay its proceedings so that the parties could submit the following issues for arbitration: (1) whether the company had completely withdrawn from the plan in 1983; and (2) whether Thibodo,

the company's sole shareholder, was personally and individually liable for the company's withdrawal liability. The arbitrator concluded that the company had withdrawn from the plan on June 15, 1983,[2] and that Thibodo was personally liable for the company's withdrawal liability.[3]

After the arbitrator's decision, the Trustees moved the district court to enforce the arbitration award. In opposition, Thibodo asserted that the Trustees' district court action had been filed beyond the limitations period provided in ERISA. The district court agreed with Thibodo and dismissed the action.

DISCUSSION

We must decide when the statute of limitations begins to run for actions to recover withdrawal liability payments under ERISA and the MPPAA. We hold that, for actions to recover withdrawal liability incurred as a result of com-

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[2] The Trustees dispute this determination by arguing that Thibodo had a legal obligation to continue payments to the plan for a short time beyond the CBA's expiration on June 15, 1983. *See* 29 U.S.C. § 1383(e) (date of complete withdrawal is the date that the employer ceased to have an obligation to contribute to the plan). Thus, they argue, the "date of complete withdrawal" was later than June 20, 1983. If this argument were accepted, then the Trustees' action would be timely regardless of whether the limitations period began to run on the "date of complete withdrawal" as defined in § 1383(e).

We need not address the question of when Thibodo's obligation to contribute ceased because we conclude that the limitations period does not run from the date of complete withdrawal as defined in § 1383(e). For the same reason we need not address the parties' contentions pertaining to: (1) whether the arbitrator improperly decided an issue not before it when it determined an exact date on which Thibodo withdrew; and (2) whether the district court should have deferred to the arbitrator's determination of the date of complete withdrawal.

[3] We express no opinion regarding the correctness of this determination.

plete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met. In this case, that date fell sometime in the Spring of 1985, when the company resumed work of the type for which contributions were previously required.

The district court concluded that the limitations period began running on June 15, 1983, which the arbitrator determined to be the "date of complete withdrawal" as defined in § 1383(e).[4] We repudiate that conclusion because, under the district court's approach, the limitations period was running against the Trustees before they acquired a cause of action against Thibodo. For purposes of limitations, Thibodo's complete withdrawal from the Plan occurred in the Spring of 1985 when his company resumed employing laborers, because only then were the statutory conditions for complete withdrawal met. 29 U.S.C. § 1383(b)(2). Before that time, the Trustees had no right to assess or receive withdrawal liability payments from Thibodo. Indeed, the Trustees realized as much in 1984 when they withdrew their original assessment. It is anomalous to conclude that the limitations period of § 1451(f) was running against the Trustees before they had a right to sue.

For the purpose of calculating the amount of withdrawal liability under § 1391, it is useful to fix the "date of complete withdrawal" as the date when the duty of regular contribution ceased. *See* 29 U.S.C. § 1383(e); *Joyce*, 871 F.2d at 1123. But in the case of a withdrawal in the construction industry, selection of such a date may involve a considerable period of relation back, as it does in the present case. The fact that it is useful to relate back for purposes of calculation of liability, however, does not mean that it is useful to relate back for purposes of the statute of limitations. Limitations run from "the date on which the cause of action arose." 29 U.S.C. § 1451(f)(1).

We conclude, therefore, that the limitations period of § 1451(f) begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met—in this case, the Spring of 1985. Because the Trustees' action was initiated within six years of the Company's resumption of covered work, their action is timely and the district court erred in dismissing it.

We recognize that our approach differs from that taken by the D.C. Circuit. In *Joyce*, that Circuit concluded that the limitations period does not begin to run until the plan makes a demand upon the employer for withdrawal liability payments and the employer refuses that demand.[5] *Joyce*, 871 F.2d at 1124; *see also ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc.*, 735 F.Supp. 103, 106 (S.D.N.Y.1990) (adopting *Joyce* approach in § 1383(a) withdrawal liability action). In our view, that approach improperly places the running of the limitations period in the control of the plaintiff.

In deciding that the limitations period does not begin to run until a demand for payments goes unmet, the District of Columbia Circuit was influenced by the difficulty of determining when an employer had "permanently" ceased to have an obligation to contribute or "permanently"

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[4] We note that Thibodo has been unable to cite to any federal court opinion in which this approach has been adopted. His assertion that the Seventh Circuit adopted this approach in *Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989), is erroneous. That case says nothing about when the limitations period for withdrawal liability actions begins to run. Our statement to the contrary in *Brentwood Financial Corp. v. Western Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456, 1459 (9th Cir.1990), was incorrect. *See Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 170-71 (7th Cir.1993), *cert. denied* —— U.S. ——, 114 S.Ct. 1062, 127 L.Ed.2d 382 (1994).

[5] The District of Columbia Circuit's approach would not aid Thibodo, of course, because it selects a date even later than the one we choose.

ceased all covered operations, within the meaning of § 1383(a). *Joyce*, 871 F.2d at 1123-24. Whatever the difficulties might be under that subsection, we conclude that the construction industry provisions of § 1383(b) do not lead to debilitating uncertainty concerning whether an employer has completely withdrawn. Determining whether an employer continues to perform work of the type for which contributions were required, or resumes such work within 5 years is relatively straightforward. *See* 29 U.S.C. 1383(b)(2)(B).[6] We see no reason, therefore, to choose a date of limitations that is in the control of the plaintiff and, theoretically at least, might not be triggered for many years.[7] We also consider our rule to involve a more natural construction of § 1451(f), which sets the limitation as "6 years after the date on which the cause of action arose, or 3 years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such cause of action." There is little reason for the second clause if the cause of action does not come into existence until demand for payment is made and refused.

For these reasons, we decline to adopt the D.C. Circuit's approach—at least with respect to § 1383(b) withdrawals—and hold that for actions to collect withdrawal liability incurred under 29 U.S.C. § 1383(b), the limitations period found in 29 U.S.C. § 1451(f) begins to run on the date that the statutory conditions for withdrawal are

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[6] We do not decide whether the potential difficulties of determining when an employer has "permanently" ceased covered operations under § 1383(a) warrants adoption of the D.C. Circuit's approach in suits seeking recovery of withdrawal liability incurred under that section.

[7] The District of Columbia Circuit opined that there were several incentives for plan sponsors to act promptly in demanding payment of withdrawal liability. *Joyce*, 871 F.2d at 1126-27. There may be, but control still remains with the plaintiff.

met. Because the Trustees brought this action well within six years after that date, it is not time-barred.

No. 93-55079 REVERSED and REMANDED.

No. 93-55080 DISMISSED.

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), provides in relevant part as follows:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

. . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in

favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

. . . .

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sums of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had

withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan

year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under

paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. . . .

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

. . . .

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitraiton proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

. . . .

(d) Payments by employer prior to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected

by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

. . . .

(b) Failure of employer to make timely withdrawal liability payment within prescribed time.

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the prescribed time shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

. . . .

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 C.F.R. § 2644.2 Overdue and defaulted withdrawal liability; overpayment

(a) Overdue withdrawal liability payment. Except as otherwise provided in rules adopted by the plan in accordance with Sec. 2644.4, a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor.

(b) Default.

(1) Except as provided in paragraph (c)(1), 'default' means—

(i) The failure of an employer to pay any overdue withdrawal liability payment within 60 days after the employer receives written notification from the plan sponsor that the payment is overdue; and

(ii) Any other event described in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(2) In the event of a default, a plan sponsor may require immediate payment of all or a portion of the outstanding amount of an employer's withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability.

(c) Plan review or arbitration of liability determination. The following rules shall apply with respect to the obligation to make withdrawal liability payments during the period for plan review and arbitration and with respect to the failure to make such payments:

(1) A default as a result of failure to make any payments shall not occur until the 61st day after the last of—

(i) Expiration of the period described in section 4219(b)(2)(A) of the Act;

(ii) If the employer requests review under section 4219(b)(2)(A) of the Act of the plan's withdrawal liability determination or the schedule of payments established by the plan, expiration of the period described in section 4221(a)(1) of the Act for initiation of arbitration; or

(iii) If arbitration is timely initiated either by the plan, the employer or both, issuance of the arbitrator's decision.

(2) Any amounts due before the expiration of the period described in paragraph (c)(1) shall be paid in accordance with the schedule established by the plan sponsor. If a payment is not made when due under the schedule, the payment is overdue and interest shall accrue in accordance with the rules and at the same rate set forth in Sec. 2644.3.

(d) Overpayments. If the plan sponsor or an arbitrator determines that payments made in accordance with the schedule of payments established by the plan sponsor have resulted in an overpayment of withdrawal liability, the plan sponsor shall refund the overpayment, with interest, in a lump sum. The plan sponsor shall credit interest on the overpayment from the date of the overpayment to the date on which the overpayment is refunded to the employer at the same rate as the rate for overdue withdrawal liability payments, as established under Sec. 2644.3 or by the plan pursuant to Sec. 2644.4.

29 C.F.R. § 2644.3 Interest on overdue, defaulted and overpaid withdrawal liability

(a) Interest assessed. The plan sponsor of a multiemployer plan—

(1) Shall assess interest on overdue withdrawal liability payments from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e); and

(2) In the event of a default, may assess interest on any accelerated portion of the outstanding withdrawal liability from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e).

. . . .

(d) Due date. Except as otherwise provided in rules adopted by the plan, the due date from which interest accrues shall be, for an overdue withdrawal liability payment and for an amount of withdrawal liability in default, the date of the missed payment that gave rise to the delinquency or the default.

(e) Date paid. Any payment of withdrawal liability shall be deemed to have been paid on the date on which it is received.